



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

April 14, 1992

Mr. Jeff Hankins
Program Division, Legal Services 110-1C
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR92-134

Dear Mr. Hankins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 14884.

You have received a request for information relating to a Texas Department of Insurance (the "department") request for proposal. Specifically, the requestor seeks release of department Request for Proposal TXISO-2 following conclusion of a contract. We note that the requested information was addressed in Open Records Letter 92-20 (1992). In that letter, we held that the requested information was excepted from required public disclosure by section 3(a)(4) of the Open Records Act which excepts "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests during the sealed bid process. See Open Records Decision No. 463 (1987). However, once the competitive bidding process has ceased and a contract has been awarded, section 3(a)(4) is no longer applicable. Open Records Decision No. 541 (1990). You advise us that the TXISO-2 contract has been awarded and that you no longer assert the 3(a)(4) exception. Accordingly, except for information marked by a third party as "Proprietary and Confidential," you have released the requested proposal. You claim that the portion marked "Proprietary and Confidential" is excepted from required public disclosure by section 3(a)(10) of the Open Records Act.

Pursuant to section 7(c) of the act, we have notified the third party whose proprietary interests may be compromised by disclosure of the requested information. In response, we have received a letter from BDO Seidman, which

claims that the requested information is excepted from required public disclosure by sections 3(a)(4) and 3(a)(10) of the Open Records Act. BDO Seidman claims that the requested information "constitutes a trade secret . . . and financial and commercial information that is privileged or confidential."

As noted above, section 3(a)(4) protects only governmental interests. Furthermore, the contract has been awarded and section 3(a)(4) is no longer applicable. Section 3(a)(10) excepts from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. The Restatement lists six factors to be considered in determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939). These factors are indicia of whether information constitutes a trade secret; depending on the information being considered, one factor alone may be indication of a trade secret. *Id.*; *see also* Open Records Decision No. 552 at 3. In making trade secret determinations under section 3(a)(10), this office will accept a claim as valid if the claimant establishes a

prima facie case for its assertion of trade secrets that is unrebutted as a matter of law. *Id.* at 5. Whether a claimant makes a *prima facie* case depends on whether its arguments, as a whole, correspond to the criteria for trade secrets detailed in the Restatement of Torts. *Id.* at 2-3.

Section 3(a)(10) also protects certain commercial and financial information that need not constitute a trade secret. Open Records Decision No. 592 (1991) held that "[i]n order to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' must be 'privileged or confidential' under the common or statutory law of Texas." *Id.* at 9 (citing the summary). When an agency or company fails to provide relevant information regarding factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). See Open Records Decision No. 402 (1983).

We have examined the documents submitted to us for review. Neither the department nor BDO Seidman have demonstrated how the requested information constitutes a trade secret. Further, it has not been demonstrated that the requested information is otherwise deemed privileged or confidential by common or statutory law. Accordingly, the requested information may not be withheld from required public disclosure under section 3(a)(10) of the Open Records Act and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-134.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GK/lmm

Ref.: ID# 14884
ID# 15309
ID# 15062

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